

Dang (Migration) [2018] AATA 1554 (26 April 2018)

DECISION RECORD

DIVISION:	Migration & Refugee Division
REVIEW APPLICANT:	Ms Thi Bich Ngoc Dang
VISA APPLICANTS:	Mr Minh Thuan Le Miss Nguyen Minh Anh Le Mr Nguyen Hoang Anh Le
CASE NUMBER:	1621160
DIBP REFERENCE(S):	OSF2015/071778
MEMBER:	Helena Claringbold
DATE:	26 April 2018
PLACE OF DECISION:	Sydney
DECISION:	The Tribunal affirms the decisions not to grant the visa applicants Partner (Provisional) (Class UF) visas.

STATEMENT MADE ON 26 APRIL 2018 AT 8:38AM

CATCHWORDS

Migration – Partner (Provisional) (Class UF) visa – Subclass 309 (Partner (Provisional)) – Whether the applicant is in a genuine spousal relationship with the sponsor – Witness credibility – Inconsistencies between evidence of applicant and sponsor – Lack of evidence of genuine spousal relationship – Decision affirmed

LEGISLATION

Migration Act 1958 (Cth), ss 5F, 65

Migration Regulations 1994 (Cth), r 1.15A(3), Schedule 2, cls 309.211(2), 309.221, 309.321(a)

STATEMENT OF DECISION AND REASONS

APPLICATION FOR REVIEW

1. On 22 December 2015, Mr Minh Thuan Le, the first named visa applicant (the visa applicant), applied for Partner (Provisional) (Class UF) visas. The application was made based on his spousal relationship with Ms Thi Bich Ngoc Dang, the sponsor and review applicant. Miss Nguyen Minh Anh Le and Mr Nguyen Hoang Anh Le are the secondary visa applicants.
2. On 12 October 2016, a delegate of the Minister for Immigration and Border Protection refused to grant the visas. The delegate was not satisfied that the visa applicant is the spouse of the sponsor. As a result the visa applicant did not satisfy cl.309.211(2) and cl.309.221 of Schedule 2 to the Migration Regulations 1994 (the Regulations). As the visa applicant did not satisfy the primary criteria for the grant of the visa, the secondary visa applicants did not satisfy cl.309.321(a) of the Regulations. This is a review of the delegate's decision.
3. On 3 April 2018, the sponsor appeared before the Tribunal to give evidence and present arguments. She provided the Tribunal with a copy of the delegate's decision record. The Tribunal also received oral evidence from Mr Le. The sponsor was represented in relation to the review by her registered migration agent.
4. For the following reasons, the Tribunal has concluded that the decision under review should be affirmed.
5. The Tribunal has considered the evidence individually and as a whole. The parties provided inconsistent evidence to the Tribunal. The parties have not satisfied the Tribunal that they are credible.
6. The parties have not satisfied the Tribunal that they have a mutual commitment to a shared life as husband and wife to the exclusion of all others and that their relationship is genuine and continuing.

CONSIDERATION OF CLAIMS AND EVIDENCE

7. The Tribunal has taken into consideration, individually and as a whole, all the evidence in the Department of Immigration and Border Protection's file and the Tribunal's file and the evidence at the Tribunal hearing.

8. ISSUE

9. The issue in the present case is whether the visa applicant is the spouse of the sponsor applicant as defined in s.5F of the *Migration Act 1958* (the Act).

10. BACKGROUND ON THE EVIDENCE

11. The visa applicant was born in 1962 in Thanh Hoa, Vietnam. His father is deceased. His mother and four siblings live in Vietnam. In 2002, he married Ms Thi Thu Hang Nguyen.
12. On 1 June 2014, the visa applicant, Ms Nguyen, his ex-spouse and their children, travelled to Australia to visit Ms Nguyen's brother, Mr Tuan Cuong Nguyen. Cuong introduced the visa applicant to the sponsor. On 25 June 2014, the applicant, his ex-spouse and children returned to Vietnam. On 30 December 2014, the visa applicant and Ms Nguyen divorced.

13. The sponsor was born in 1965 in Phan Thiet, Vietnam. Her parents are deceased. She has four siblings living in Vietnam and two siblings living in Australia. She was granted Australian Citizenship in 1990. On 16 January 2000, she married Mr Van Hung Bui. On 28 June 2009, the sponsor and Mr Bui divorced.

14. In June 2014, the parties met in Australia. In July 2015, the visa applicant proposed to the sponsor by telephone. On 20 October 2015, the parties married in Ho Chi Minh City.

Is the applicant the spouse of an eligible citizen?

15. The Tribunal is satisfied that the sponsor, at the time of visa application and at the time of decision, was an Australian citizen.

Are the parties validly married?

16. At the time the visa application was made the visa applicant provided evidence of his marriage to the review applicant. On the evidence, the parties were married to each other under a marriage that is valid for the purposes of the Act as required by s.5F(2)(a).

Are the parties in a spousal relationship?

17. 'Spouse' is defined in s.5F of the Act and provides that a person is the spouse of another where the two persons are in a married relationship. Persons in a married relationship must be married to each other under a marriage that is valid for the purposes of the Act, there must be a mutual commitment to a shared life as a married couple to the exclusion of all others, the relationship must be genuine and continuing, and the couple must live together, or not live separately and apart on a permanent basis: s.5F(2)(a)-(d).
18. In forming an opinion about these matters, regard must be had to all of the circumstances of the relationship. This includes evidence of the financial and social aspects and the nature of the visa applicant's and review applicant's household and their commitment to each other as set out in r.1.15A(3) of the Regulations, which is extracted in the attachment to this decision.
19. On these aspects the Tribunal has considered the evidence before it and is satisfied the facts of this case are as follows.

20. CLAIMS AND FINDINGS

21. The parties do not have any joint ownership of assets or joint liabilities. They do not have any legal obligations owed to the other party and do not have any sharing of day-to-day household expenses. They do not have any pooling of financial resources in relation to major financial assets. The visa applicant invested 800 million VND in a family business. From this investment he receives a dividend of between US\$1,500 to US\$2,000 monthly. He also receives a pension payment of 4 million VND monthly. The sponsor has fortnightly earnings of A\$580 and also receives a fortnightly government payment of A\$400. There is evidence that the sponsor sent money to the visa applicant. The sponsor initially claimed that the visa applicant's children were dependent on her. However, other information is that they are financially dependent on the visa applicant. This is discussed below. The Tribunal accepts that the sponsor has sent money to the visa applicant. The Tribunal accepts that the parties live in separate countries and have not pooled their financial matters.
22. The parties do not have any joint responsibility for the care and support of children. The visa applicant lives in Vietnam and the sponsor lives in Australia. The parties told the Tribunal that when the sponsor is in Vietnam they live together in the visa applicant's home and share household duties and during those times the sponsor cares for the visa applicant's children. The Tribunal accepts that the sponsor has household registration at the visa applicant's

home and that the parties live in separate countries and have not formed their household. The Tribunal does not accept that the parties have shared household duties in their own household.

23. The parties gave evidence that their families and friends know about their spousal relationship. The parties told the Tribunal that when the sponsor is in Vietnam the parties go out for meals and coffee. The sponsor's migration agent stated that the parties openly express their relationship to family, friends and neighbours. Photographic evidence depicts the parties with others at their traditional wedding ceremony. Other images show the parties together with the secondary visa applicants and others at different locations. There are no third party statements before the Tribunal attesting to the parties' relationship, however even if there were, they would be unable to negate the Tribunal concerns about the inconsistent information the parties provided the Tribunal or about its concerns about the parties' credibility. The Tribunal accepts that the parties travelled and socialised together.
24. The parties have been married since October 2015. The applicant's migration agent informed the Tribunal that the parties during their married relationship have lived together for an accumulated time of over two months. The parties told the Tribunal that they want to be reunited and live in Australia. The parties provided inconsistent evidence about their circumstances which led the Tribunal not to accept that the parties are committed to each other or that they offer each other companionship and emotional support or see their relationship as long term. These matters are discussed further below.
25. The Tribunal discussed with the sponsor the parties' initial evidence, which is that, the parties met when the visa applicant, his ex-spouse and children were visiting Australia in June 2014. After their visit, the visa applicant, his ex-spouse and children returned to Vietnam. In December 2014, the sponsor stated that both the visa applicant and his ex-spouse gave her their telephone number and said if she were ever in Vietnam to contact them. In the same statement she claimed that in January 2015, Cuong told her that the visa applicant and his wife had divorced and that the visa applicant was upset. She stated that she asked Cuong if it was ok for her to contact the visa applicant and with Cuong's approval she initiated contact with the visa applicant to console him. The visa applicant in his statement claimed that the sponsor initiated contact with him in January 2015.
26. The Tribunal also discussed the information in the delegate's decision record which stated that the sponsor's telephone bills records the sponsor making seven telephone calls to the visa applicant's telephone number between 7 and 22 December 2014 and there is a gift receipt that, records that on 16 December 2014, the sponsor sent seven boxes of chocolates to the visa applicant. The Tribunal discussed that in January 2017, the sponsor changed her evidence and stated that in December 2014, she contacted the visa applicant for a friendly chat. She stated that she found his marriage had broken down and she sent him chocolates to show him she cared. The applicant also provided the Tribunal with telephone statements recording these calls.
27. At the Tribunal hearing the sponsor did not challenge the information recorded in the delegate's decision record about the telephone calls between 7 and 22 December 2014 or about her sending seven boxes of chocolates to the visa applicant in December 2014. She told the Tribunal that during that time, if there was something that upset the parties, 'they got in touch as friends'. She said that there was trouble in the visa applicant and his ex-spouse's family and she advised them to reconcile and she doesn't know what 'made them split'. Also she stated that she liked the visa applicant's children and the only way she could ask about their health was through the visa applicant.
28. In January 2018, the sponsor's migration agent claimed that the sponsor contacted the visa applicant in December 2014 to check up on him and support him as a friend. She stated that

in January 2015, the sponsor sought Cuong's approval to contact the visa applicant, as someone she cared for, as more than a friend and Cuong gave his approval for the contact and the parties' relationship. The Tribunal does not accept this explanation for the parties not providing information about their contact in December 2014. It is perplexed about the reasons for the parties not disclosing their contact in December 2014. The visa applicant and his ex-spouse did not divorce until 30 December 2014, which is after the parties' contact in December 2014. Even if the Tribunal accepted that the parties' relationship began in either December 2014 or January 2015, the Tribunal, when it considers the visa applicant's divorce from his ex-spouse, is concerned about the quick development of the parties' relationship and when it considers that the parties have not been truthful about their relationship, the Tribunal does not accept that the parties are in a genuine and continuing spousal relationship. In addition, the Tribunal is not satisfied that the parties are credible.

29. The Tribunal put information to the sponsor under the relevant provision. The sponsor responded to some information at the Tribunal hearing and requested and was granted additional time to respond to other information. On 10 April 2018, the sponsor's migration agent provided a response to these matters from the visa applicant. As this response was provided by the sponsor's migration agent it is taken to be from the sponsor. The information is as follows.
30. The sponsor applied to the Tribunal for a waiver of the application for review fee. In that request she declared the secondary visa applicants as her dependent children.
31. She declared her fortnightly expenses to be \$600 for board, \$80 for utilities, \$150 for food, \$30 for car etc, \$40 for clothing and miscellaneous costs bringing the total expenses to \$900. She also stated and that her fortnightly income to be \$926.
32. The Tribunal asked the sponsor why she had claimed the visa applicant's children as her dependents, when the evidence before the Tribunal is that the visa applicant supports his children. The Tribunal also asked the sponsor why she was sending the visa applicant money and how she managed to do this with an excess income of only \$26 a fortnight.
33. The sponsor stated the following; at that time her employment was not stable and she received on the job training and a Centrelink payment. Later the amount of money she received became stable because of job training, a Centrelink payment and she was employed for 15 hours weekly. The visa applicant does not have enough income and she sends him money because he has extra curriculum tuition expenses for tuition fees for his children.
34. The visa applicant provided information that the sponsor sometimes sends him money and this is used for gifts for the children and tuition fees but it is not regular and the children are his dependents. This information was put to the sponsor as it is inconsistent with the sponsor's information that the visa applicant's children are dependent on her.
35. The sponsor responded and stated that she sends the visa applicant money occasionally to buy the children presents and assist with educational fees. While the Tribunal accepts that this may be the case, this occasional support is not indicative of children who are dependent on a person. The sponsor's claims about the visa applicant's children being her dependants are unfounded, because the evidence is that they are dependent on the visa applicant and this led the Tribunal not to be satisfied that the sponsor is credible and not to accept that the parties have joint responsibility for the care and support of children.
36. The visa applicant provided information that when he and his children come to Australia, perhaps they will live in the sponsor's accommodation, if it is big enough, or, if the sponsor's accommodation is too small, perhaps they will rent a place. This information was put to the

sponsor as it is inconsistent with her evidence that when the visa applicants come to Australia the sponsor will rent a place.

37. The sponsor responded via the visa applicant and stated that the parties' responses are consistent, as the parties would first live at the sponsor's home and move out when financially able. The Tribunal does not agree with this argument. The sponsor was spontaneous and emphatic that the parties would rent a place. The parties could not provide agreed evidence about where they would live together in Australia. Neither could the visa applicant determine whether the accommodation the sponsor lives in would be large enough for the parties and the visa applicant's children to live. The Tribunal is not satisfied that the parties have planned for their living arrangements together in Australia. The Tribunal is not satisfied that the parties see their relationship as long term.
38. The visa applicant provided information that the sponsor has a fortnightly salary of A\$548 and received another A\$400 for doing extra work. This information was put to the sponsor as it is inconsistent with the sponsor's information that the A\$400 is a Centrelink payment.
39. The sponsor responded via the visa applicant and stated that, as they do not have a system like Centrelink in Vietnam, he was unclear about the additional \$400 income for the sponsor. The Tribunal accepts this explanation.
40. The visa applicant provided information that he invested 800 million VND in a family business. He stated that his income from the investment is between US\$1,700 and US\$ 2,000 monthly. In addition he receives a pension of 4 million VND monthly. This information was put to the sponsor as it is inconsistent with the sponsor's information that the visa applicant earns between US\$1,500 and US\$2,000 from his investment and does not have any other income. In addition, the sponsor was unable to tell the Tribunal the amount of money the visa applicant had invested in the family business.
41. The sponsor responded via the visa applicant and stated that the sponsor didn't tell the Tribunal about the amount of money he invested because she could not remember. He stated that the parties did not discuss his financial matters in detail because he felt it is a personal matter. However the sponsor knows that the visa applicant is stable and can support himself and his children. The Tribunal is perplexed by this response. On one hand, the visa applicant claims that the sponsor could not remember the financial details of his investment. On the other hand, he claims that the parties didn't discuss this because he felt it to be a personal matter. The Tribunal considers it reasonable to expect that couples in a spousal relationship of approximately two and a half years would understand their financial circumstances. It does not accept that the parties provide each other with companionship and emotional support.
42. The visa applicant provided information that his home is jointly owned by himself and his ex-spouse. This information was put to the sponsor as it is inconsistent with the sponsor's information that the visa applicant owned his home.
43. The sponsor responded via the visa applicant who stated that the sponsor statement was correct. The sponsor was aware that an agreement had been reached with his ex-spouse, that after they divorced, the property would be transferred to the visa applicant, once he sold the property and settled some money with his ex-spouse after the sale. The Tribunal is of the view that the visa applicant is fabricating evidence to allay the inconsistent evidence provided at the Tribunal hearing. At the Tribunal hearing the visa applicant stated that after the sale of the property, the outcome of sale would be divided four ways between his ex-spouse, himself and his children. As detailed above the Tribunal does not accept that the parties provide each other with emotional support and companionship.

44. The visa applicant provided information that his daughter and son each year earned the title of a very good student. This title is achieved by student's having a mark of 8.5 out of 10. He stated that his daughter plays basketball and badminton for pleasure and does not have any extracurricular activities. He said that the cost of her education is 11 million VND monthly. He stated that his son is in year 5 and takes part in competitive martial arts both for the district club and for his school and enjoys football and badminton. He later stated that his son also learns English. He stated that the cost of his education is 5 million VND plus his extra tuition. This information was put to the sponsor as it is inconsistent with the sponsor's information that the visa applicant's daughter and son are average students across all subjects. She said that she didn't know the cost of the children's education but it would be about US\$2,000 and this includes food. She stated that the daughter is good at basketball or volleyball, using a stick, while the son is in year 6 and is not involved in competition sport but takes part in swimming at school and after school. She stated that both children have extracurricular tuition in sport, English, maths and chemistry. Additionally, the daughter also has extra tuition in literature and piano.
45. The sponsor responded via the visa applicant and stated that a 'very good student' is indicative of being average and seventy per cent of students were awarded this title. He continued that although his children do not do any academic studies with their school they do extra study at home to keep on top of their school work and occasionally with private tutors. They also do leisure activities which changes over time. The music lessons his daughter undertook and the leisure sport the children were playing was at the time the sponsor was in Vietnam and these have since changed. The Tribunal is of the view that the parties do not share day-to-day matters and do not provide each other with emotional support and companionship. In another statement the visa applicant claims that the sponsor loves his children and this has been shown unconditionally throughout the years of the parties' relationship. If this is the case, the Tribunal is puzzled why the sponsor would not be more aware of the children's day-to-day activities.
46. The visa applicant provided information that his children do not live with their mother because she is with another man. He stated that he retired early to look after his children. This information was put to the sponsor as it is inconsistent with the sponsor's information that the children do not live with their mother because their mother works and needs to go 'far distances' and it is because of her work and travel.
47. The sponsor responded via the visa applicant and stated that the decision for his children to live with him was based on many factors. He felt that the parties should have elaborated on this at hearing. The Tribunal accepts that this may be the case but the parties provided different accounts of why the children were living with their father.

48. Other Considerations

49. The Tribunal told the applicant that copies of money transfers, phone bills and photographs the agent claimed to have provided the Department were not on the Department's file and therefore not before the Tribunal. At the Tribunal hearing the applicant's migration agent provided a plastic envelope containing a disorganised profusion of documents; some were in English and others were in another language and also photographs were also provided. The Tribunal retained the photographs. However the Tribunal returned the documents to the applicant's migration agent. The Tribunal requested and provided additional time for the documents to be resubmitted in an understandable manner. On 12 April 2018, that time lapsed. At the time of this decision this information had not been provided to the Tribunal. The Tribunal accepts that the sponsor sent money to the visa applicant and that the parties were in contact by telephone and were photographed together and with others.

50. The Tribunal considered all aspects of the parties' relationship including the financial and social aspects, the nature of the household and the parties' commitment to each other. It has considered the evidence individually and as a whole. The Tribunal finds that the parties know each other personally, have lived together, have socialised in Vietnam and have communicated with each other. However, the Tribunal is not satisfied that the parties are in a genuine spousal relationship.
51. The Tribunal considered all the evidence individually and as a whole including the Department and Tribunal case files and the evidence pre-and post-hearing and at the Tribunal hearing. Given the inconsistent evidence and credibility concerns, the Tribunal, is not prepared to accept the parties' evidence about their commitment to the relationship. The parties have not satisfied the Tribunal that at the time of application and this decision the parties have a mutual commitment to a shared life to the exclusion of all others, that they have a genuine and continuing relationship, or that they live together and not separately and apart on a permanent basis.
52. Therefore the visa applicant does not meet cl.309.211 and cl.309.221 of Schedule 2 to the Regulations.
53. As the visa applicant has not satisfied the primary criteria for the grant of the visa, it follows that the secondary visa applicants do not meet cl.309.321(a) of Schedule 2 to the Regulations and do not satisfy the criteria for the grant of the visas.
54. There is no evidence before the Tribunal that the applicants satisfy any of the alternate criteria for the grant of the visas.
55. For the reasons above, the visa applicants do not satisfy the criteria for the grant of the visas.

DECISION

56. The Tribunal affirms the decisions not to grant the visa applicants Partner (Provisional) (Class UF) visas

Helena Claringbold
Member

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ATTACHMENT - Extract from Migration Regulations 1994

1.15A Spouse

- (1) For subsection 5F (3) of the Act, this regulation sets out arrangements for the purpose of determining whether 1 or more of the conditions in paragraphs 5F (2) (a), (b), (c) and (d) of the Act exist.
- (2) If the Minister is considering an application for:
 - (a) a Partner (Migrant) (Class BC) visa; or
 - (b) a Partner (Provisional) (Class UF) visa; or
 - (c) a Partner (Residence) (Class BS) visa; or
 - (d) a Partner (Temporary) (Class UK) visa;the Minister must consider all of the circumstances of the relationship, including the matters set out in subregulation (3).
- (3) The matters for subregulation (2) are:
 - (a) the financial aspects of the relationship, including:
 - (i) any joint ownership of real estate or other major assets; and
 - (ii) any joint liabilities; and
 - (iii) the extent of any pooling of financial resources, especially in relation to major financial commitments; and
 - (iv) whether one person in the relationship owes any legal obligation in respect of the other; and
 - (v) the basis of any sharing of day-to-day household expenses; and
 - (b) the nature of the household, including:
 - (i) any joint responsibility for the care and support of children; and
 - (ii) the living arrangements of the persons; and
 - (iii) any sharing of the responsibility for housework; and
 - (c) the social aspects of the relationship, including:
 - (i) whether the persons represent themselves to other people as being married to each other; and
 - (ii) the opinion of the persons' friends and acquaintances about the nature of the relationship; and
 - (iii) any basis on which the persons plan and undertake joint social activities; and
 - (d) the nature of the persons' commitment to each other, including:
 - (i) the duration of the relationship; and
 - (ii) the length of time during which the persons have lived together; and
 - (iii) the degree of companionship and emotional support that the persons draw from each other; and
 - (iv) whether the persons see the relationship as a long-term one.
- (4) If the Minister is considering an application for a visa of a class other than a class mentioned in subregulation (2), the Minister may consider any of the circumstances mentioned in subregulation (3).